

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

THE ARC OF SOUTH NORFOLK
Employer

and

Case 01-RC-213174

AMERICAN FEDERATION OF STATE, COUNTY
& MUNICIPAL EMPLOYEES, COUNCIL 93
Petitioner

ORDER

The Employer's Request for Review of the Acting Regional Director's Decision and Direction of Election is granted as it raises a substantial issue regarding whether the Employer's Program Coordinators possess the authority to assign or responsibly direct employees within the meaning of Section 2(11). The Request for Review is denied in all other respects.¹

¹ In denying review of the Acting Regional Director's findings that the Program Coordinators here do not have the supervisory authority to effectively recommend hiring or to effectively recommend discipline, we do not rely on the Acting Regional Director's suggestion that such recommendations must be "binding" to confer supervisory status under the Act. It is well established that a recommendation is effective when "the recommended action is taken without independent investigation by superiors, not simply that the recommendation is ultimately followed." *Children's Farm Home*, 324 NLRB 61, 61 (1997). Although a "binding" recommendation might well be effective, the Board does not require that a recommendation be "binding" in order to be effective.

With respect to the Program Coordinators' putative authority to effectively recommend hiring, the Board has found that a purported supervisor does not effectively recommend hiring when a recommendation does not concern whether a candidate should be hired by an employer, but instead concerns whether a candidate should be placed in a purported supervisor's particular area or department. *Training School at Vineland*, 332 NLRB 1412, 1412, 1417 (2000). The Board has found that such recommendations do not primarily implicate the employer's interest, but instead are based on the purported supervisor's interest in maintaining a harmonious working environment in the area or department. See *Kenosha News Publishing Corp.*, 264 NLRB 270, 271 (1982); *Willis Shaw Frozen Food Express*, 173 NLRB 487, 488 (1968). Such is the case here, based on the very testimony cited by the Employer in its Request for Review. The Employer cited testimony from two managers that Program Coordinators conduct "working interviews" with a candidate and evaluate whether a candidate is "an appropriate match" for a Program Coordinator's group room. The managers further testified that although they would not hire a candidate for a particular Program Coordinator's group room without that Program Coordinator's approval, they

Contrary to our dissenting colleague, we find that the request for review raises a question whether the Acting Regional Director may have disregarded relevant evidence and thereby clearly erred in finding that the Program Coordinators did not exercise statutory supervisory authority with respect to the assignment and responsible direction of case managers' work. In particular, the Employer identified testimony from a Program Coordinator explaining that he assigns case managers to work with certain participants based on his assessment of the case manager's skills relative to participants' needs. Further, the Employer points to testimony from Program Coordinators that they make decisions about what occurs in their rooms and that they are accountable for the actions of case managers. The Acting Regional Director failed to sufficiently address this evidence, and the overall summary nature of his discussion of the responsible direction issue raises a concern that other relevant evidence may not have been properly considered. Accordingly, we cannot affirm the decision below without a full review of the record. Unlike our colleague, we express no view with respect to whether the Program Coordinators are statutory supervisors until we have completed that review.

JOHN F. RING,

CHAIRMAN

MARVIN E. KAPLAN,

MEMBER

Dated, Washington, D.C., August 15, 2018.

MEMBER PEARCE, dissenting in part:

Contrary to my colleagues, who grant the Employer's request for review of the Acting Regional Director's findings that the Employer's Program Coordinators do not possess the authority to assign or responsibly direct employees within the meaning of

might nevertheless hire the candidate into a different Program Coordinator's group room. Accordingly, we deny review of the Acting Regional Director's decision in this regard.

With respect to discipline, we find that the Employer has not established that it maintains a progressive discipline policy because Program Coordinators can engage in any amount of informal counseling without it warranting further discipline and because managers can skip over steps in the discipline policy if they feel more serious discipline is warranted. See *Veolia Transportation Services, Inc.*, 363 NLRB No. 98, slip op. at 8-9 (2016) (explaining that a discipline system is not progressive if steps can be skipped or repeated). In circumstances such as these, where there is no progressive discipline system and where the purported supervisors report misconduct but do not recommend formal discipline, the Board has found that the purported supervisors lack the authority to discipline or to effectively recommend discipline under the Act. See *id.*, slip op. at 9-10; *Illinois Veterans Home at Anna L.P.*, 323 NLRB 890, 890 (1997). Further, as the Acting Regional Director found, any disciplinary recommendation made by Program Coordinators is subject to an independent investigation by higher management.

Section 2(11) of the Act, I would deny the Employer's request for review in its entirety. The Acting Regional Director correctly found that the Employer failed to meet its evidentiary burden of showing that the Program Coordinators possess the authority to assign or responsibly direct employees, and the Employer has not established any basis under Section 102.67(d) of the Board's Rules and Regulations for granting its Request for Review.

First, I agree with the Acting Regional Director's finding that the Program Coordinators do not responsibly direct employees within the meaning of Section 2(11). The Acting Regional Director correctly found that the Employer failed to present sufficient evidence that the Program Coordinators are held accountable for their direction of case managers' work assisting clients with their personal care and daily activities and documenting their clients' progress. See *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006) (because "purely conclusory evidence is not sufficient to establish supervisory status," there must be a "more-than-merely-paper showing" of a prospect of consequences for a putative supervisor whose alleged employees do not perform tasks properly). Second, I agree with the Acting Regional Director's finding that the Program Coordinators do not assign employees within the meaning of Section 2(11) because they are primarily engaged in equalizing the case managers' workload and making ad hoc assignments based on their individual preferences. See *Oakwood Healthcare, Inc.*, 348 NLRB 686, 693 (2006). Further, even assuming the Program Coordinators assigned or responsibly directed employees, the Acting Regional Director correctly found that the Program Coordinators' discretion is narrowly circumscribed by the terms specified in their clients' state-generated individual service plans and day habilitation service plans and therefore does not require the use of independent judgment. See, e.g., *Community Education Centers, Inc.*, 360 NLRB 85, 85-86 (2014) (putative supervisors' direction of employees did not entail the use of independent judgment where their discretion was limited by the employer's policies and procedures and the exercise of such judgment was routine in nature).

Because I agree with the Acting Regional Director's finding that the Employer failed to establish that Program Coordinators possess any indicia of supervisory status, I find that they were properly included in the bargaining unit. Accordingly, I dissent from my colleagues' partial grant of review.

MARK GASTON PEARCE,

MEMBER